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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

WYANDOTTE TRIBE OF OKLAHOMA, *Petitioner*,

v.

STATE OF OKLAHOMA ex rel.
OKLAHOMA TAX COMMISSION, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Oklahoma Tax Commission's cause of action to enforce a state tax in state court against the Wyandotte Tribe for on-reservation activities is so "completely preempted" by federal law as to be deemed to arise under federal law for purposes of removal to federal court under 28 U.S.C. § 1441(a).

2. Whether the Oklahoma Tax Commission's right to relief against the Wyandotte Tribe requires resolution of substantial questions of federal law, so as to make the claim one which arises under federal law for jurisdictional purposes.

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STATE OF OKLAHOMA ex rel.
OKLAHOMA TAX COMMISSION, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioner, Wyandotte Tribe of Oklahoma, respectfully prays that a Writ of Certiorari be issued to review the decision and judgment of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on November 26, 1990.

OPINIONS BELOW

The decision and judgment of the Tenth Circuit Court of Appeals, which is reported at 919 F.2d 1449, is reprinted in Appendix A. The March 11, 1991, Order of the Court of Appeals denying the Wyandotte Tribe's petition for rehearing

is unreported and is reprinted in Appendix B.[1] The Order of the U. S. District Court for the Northern District of Oklahoma, from which appeal was taken to the Tenth Circuit, is also unreported and is reprinted in Appendix D.

JURISDICTION

The judgment of the Court of Appeals was entered on November 26, 1990. The Court of Appeals denied the Wyandotte Tribe's petition for rehearing by Order entered March 11, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Sec. 8, Cl. 3 of the United States Constitution provides, in pertinent part:

> The Congress shall have power . . . to regulate commerce. . . with the Indian Tribes.

Title 28, United States Code, §§ 1441(a)(b) and (c) are reprinted in Appendix E.

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[1] The Tribe's petition for rehearing was technically filed out of time. The petition was accompanied by an affidavit of the Tribe's counsel stating, under oath and as an officer of the court, that although the opinion of the Court of Appeals had been entered on November 26, 1990, he had not received a copy of the decision until December 17, 1990. The petition for rehearing was filed four days later, on December 21, 1991, and was treated as timely filed by the Court of Appeals. A copy of counsel's affidavit is reprinted in Appendix C.

STATEMENT OF THE CASE

1. NATURE OF THE CONTROVERSY

This case, which involves the scope of federal removal jurisdiction under 28 U.S.C. §1441(a), is a natural extension of *Oklahoma Tax Commission v. Graham*, 489 U.S. 838 (1989). In *Graham*, the Court held that the federally-based defense of tribal sovereign immunity from suit does not convert a suit otherwise arising under state law into one which arises under federal law for purposes of removal to federal court. After discussing the "well-pleaded complaint rule" and the scope of the federal removal statute, the Court held that the possible existence of a tribal sovereign immunity defense did not convert Oklahoma tax claims into federal questions, and then summarily concluded, with no analysis or discussion, "and there was *no independent basis* for original federal question jurisdiction to support removal." *Graham*, 489 U.S. at 841 (emphasis added).

This case asks the Court to recognize the independent basis for federal question jurisdiction that it did not find in *Graham*. In fact, that jurisdiction is provided by a well-recognized exception to the well-pleaded complaint rule: the complete preemption doctrine. That doctrine, frequently discussed by the Court but not addressed in *Graham*, holds that certain subject areas have been so completely preempted by federal law that any cause of action raising such a claim, even if artfully drafted to incorporate only state law theories, is necessarily federal in character and may, therefore, be removed to federal court.[2] The Supreme Court has already held that

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[2] In discussing the concept of artful pleading, the Court has applied what it characterized as a "settled principle," to hold that a plaintiff may not "use artful pleading to close off defendant's right to a federal forum . . . [and that] occasionally the removal court will seek to determine whether the real nature of the claim is federal, regardless of plaintiff's

cases involving title to Indian lands are completely preempted so as to "arise under" federal law. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393, n.8 (1987). This case asks the Court to determine whether state efforts to tax Indian tribes for on-reservation activities have likewise been completely preempted by federal law for jurisdictional purposes.

2. PROCEEDINGS BELOW

This action was originally filed by the Oklahoma Tax Commission (the "Commission") in the District Court of Ottawa County, Oklahoma on December 30, 1986. The petition sought to enjoin the Wyandotte Tribe of Oklahoma, (the "Tribe"), from operating a tribal convenience store on its reservation unless it collected state sales taxes on all sales made at the store, including sales made to Wyandotte tribal members. On that same date, the state court entered on ex parte temporary restraining order against the Tribe, requiring it, among other things, to collect state taxes on sales made to members of the Wyandotte Tribe.[3]

Shortly thereafter, the Tribe removed the state court action to the United States District Court for the Northern District of Oklahoma. The Tax Commission moved to remand the case to state court. The District Judge denied

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characterization." *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 397, n.2 (1981) (citation omitted). Plaintiffs cannot "avoid removal jurisdiction by 'artful[ly]' casting their 'essentially federal law claims' as state law claims." *Id.*

[3] To the extent the state court order compelled the Tribe to collect state sales taxes from its own members, that order violated well-established federal Indian law principles holding that states cannot tax tribal members on their own reservation. *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 481-82 (1976); *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973).

that motion, expressly finding that the Tribe had not argued, and he was not holding, that removal was based upon the existence of a tribal sovereign immunity defense. Instead, the District Judge premised his finding of federal question jurisdiction on the doctrine enunciated in *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S.1, 13 (1983), holding that the Tax Commission's right to tax the Wyandotte Tribe required resolution of substantial questions of federal law in dispute between the parties.[4]

Following other procedural matters not relevant here, the District Court decided the parties' cross motions for summary judgment. That judgment, which provided both parties some relief, was cross-appealed to the Tenth Circuit Court of Appeals.[5] The Tenth Circuit, after deciding other issues, remanded the Tax Commission's action against the Tribe to the District Court to determine whether it was barred by tribal sovereign immunity from unconsented suit.

Once back before the District Court, the Tribe filed a motion to dismiss, based on tribal sovereign immunity. At the same time, the Commission once again moved to remand the case to state court, this time on the strength of *Oklahoma Tax Commission v. Graham*, 489 U.S. 838 (1989), which had been recently decided by this Court.

After briefing and oral argument, the District

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[4] In *Franchise Tax Board*, the Court stated: "Even though state law creates appellants' causes of action, its case might still "arise under" the laws of the United States if a well-pleaded complaint established that its right to relief under state law requires resolution of a substantial question of federal law in dispute between the parties." 463 U.S. at 13.

[5] The Tax Commission appealed several aspects of the judgment but did not appeal from the District Court's denial of its motion to remand the case to state court.

Court denied the Tax Commission's motion to remand and granted the Tribe's motion to dismiss. *See* Appendix D. Although finding some superficial similarity between this case and *Graham*, the District Court reiterated its previous holding that the basis for finding federal question jurisdiction supporting removal in this case was not the same as the basis rejected in *Graham*. Appendix D at D-2. ("The Tribe has maintained consistently throughout this lawsuit that . . . the sovereign immunity defense is not the basis for removal in this case. . . . The Tribe relied on the authority of *Franchise Tax Board* in its previous opposition to remand. [Citation omitted]. This Court also relied on that authority"). The District Court also went on to specifically identify the three federal questions that it believed would have to be addressed in order to resolve the Commission's lawsuit seeking to tax the Tribe. These questions involved matters of constitutional, statutory and treaty interpretation. Appendix D at D-3, n.3. The Tax Commission appealed from that ruling.

On appeal, the Tenth Circuit reversed, vacating the judgment of dismissal and remanding the Tax Commission's action back to the state court. *See* Appendix A. The Court of Appeals, relying on *Graham*'s analysis of the well-pleaded complaint rule, held that the Commission's cause of action did not present a federal question. Although it recognized the existence of a "complete preemption" exception, the Tenth Circuit found that state taxation of an Indian tribe did not fall within its scope. In addition, the Court of Appeals stated that the Tribe had failed to identify any issue of federal law other than tribal sovereign immunity necessary to resolve the Commission's lawsuit, as required by *Franchise Tax Board*.

The Tribe filed a petition for rehearing, which was denied by the Court of Appeals on March 11, 1991. This petition followed.

REASONS FOR GRANTING THE WRIT

The Court's *per curiam* decision in *Graham* was correct, but incomplete. The Court was undoubtedly correct in holding that the existence of an anticipated tribal sovereign immunity defense would not convert a suit actually arising under state law into one arising under federal law for purposes of federal removal jurisdiction. The *Graham* analysis was incomplete, however, because it summarily concluded that there was "no independent basis" for finding federal question jurisdiction, 489 U.S. at 841, without considering the issue presented here: whether the attempted state taxation of an Indian tribe is so "completely preempted" by federal law as to necessarily raise a federal question.

That omission has now been compounded by the Tenth Circuit's decision in this case, which found that state taxation of Indian tribes has not been completely preempted by federal law, and which affirmatively held that the State of Oklahoma's right to tax the Wyandotte Tribe "arises under state law." Appendix A at A-4. That holding is contrary to long-settled principles of federal Indian law, as repeatedly stated by this Court.

The effect of these two rulings is to improperly subject the Wyandotte Tribe--and potentially every other tribe in the United States--to adjudication of its most fundamental rights in state courts. This is plainly inconsistent with the well-established principle that Indian tribes are wards of, and subordinate to, the federal government, not the states. Moreover, this Court has repeatedly noted that subjecting Indian tribes to state jurisdiction threatens the very existence of those tribal governments. This is contrary to current federal Indian policy, which seeks to promote and strengthen tribal self-government. In order to avoid a perpetuation of this problem, review of this case by the Court is necessary.

I. THE COURT SHOULD CONSIDER THE COMPLETE PREEMPTION DOCTRINE AS IT RELATES TO STATE TAXATION OF INDIAN TRIBES.

In *Graham*, the Court analyzed the well-pleaded complaint rule in these terms:

> The presence or absence of federal question jurisdiction is governed by the "well-pleaded complaint" rule. "[W]hether a case is one arising under [federal law] in the sense of the jurisdictional statute, . . . must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose." [Citations omitted].

489 U.S. at 840-41. In reliance on *Caterpillar, Inc. v. Williams*, 482 U.S 386 (1987), the Court then held that the existence of a tribal sovereign immunity defense did not convert state law tax claims asserted against the Chickasaw Nation into federal questions in order to permit removal of that case to federal court under 28 U.S.C. § 1441(a). Although that holding alone would have resolved the narrow issue presented in *Graham*, the Court went on to state, without analysis or discussion, "and there was no independent basis for original federal question jurisdiction to support removal." 489 U.S. at 841.

The issue not considered by the Court in *Graham*--but squarely presented here--is whether the state taxation of Indian tribes has been so completely preempted by federal law that any cause of action raising that issue is necessarily federal in character for jurisdictional purposes.

The "complete preemption" doctrine is a long-recognized

exception to the well-pleaded complaint rule. In fact, it was discussed in *Caterpillar*, the very case the Court relied on in deciding *Graham*. In *Caterpillar*, the Court stated:

> There does exist, however, an "independent corollary" to the well-pleaded complaint rule [citation omitted] known as the "complete pre-emption" doctrine. On occasion, the Court has concluded that the pre-emptive force of a statute is so "extraordinary" that it "converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." [Citation omitted]. *Once an area of state law has been completely pre-empted, any claim purportedly based on that preempted state law is considered, from its inception, a federal claim, and therefore arises under federal law. See Franchise Tax Board, supra*, at 24, 77 L Ed 2d 420, 103 S Ct. 2841 ("[I]f a federal cause of action completely pre-empts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law").

482 U.S. at 393 (emphasis added) (footnote omitted); *see also Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58, 63-64 (1987) ("Congress may so completely preempt a particular area that any civil complaint raising this select group of claims is necessarily federal in character"); *Avco Corp. v. Aero Lodge*, 390 U.S. 557, 558-59 (1968)(Labor Management Relations Act completely preempts state law cause of action for violation of collective bargaining agreement).

The analysis of the complete preemption doctrine from *Caterpillar*, as quoted above, is significant here for two reasons. First, the Court in *Caterpillar* cited and quoted from *Franchise Tax Board*, the same case relied upon by the Wyandotte Tribe and the District Court as providing the basis for removal jurisdiction in this case. *See* Appendix D at D-2. Equally as important, *Caterpillar* expressly recognized that some aspects of the relationship between states and Indian tribes fell within the

complete preemption doctrine. Specifically, the Court cited *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974) as an example of complete preemption. *Oneida* was a suit brought in federal court by an Indian tribe seeking possession of tribal lands. The court of appeals dismissed the action, holding that the claim did not present a federal question under the well-pleaded complaint rule. The Supreme Court reversed, holding that the question of Indian land rights "was exclusively the province of federal law," 414 U.S. at 670, and "is thus completely preempted and arises under federal law." *Caterpillar*, 482 U.S. at 393, n.8. Significantly, *Oneida* was also cited as an example of complete preemption in *Franchise Tax Board*, 463 U.S. at 23, n.25.

In *Graham*, this Court failed to consider whether state taxation of Indian tribes has been completely preempted for jurisdictional purposes. As discussed below, the Court of Appeals considered the question in this case, but reached the wrong conclusion. That error--which will improperly relegate many Indian tax cases to state court adjudication--should be reviewed by this Court.

II. THE COURT OF APPEALS IGNORED BASIC PRINCIPLES OF FEDERAL INDIAN LAW AND MANY DECISIONS OF THIS COURT IN HOLDING THAT THE TAX COMMISSION'S RIGHT TO TAX THE WYANDOTTE TRIBE AROSE UNDER STATE LAW.

Among the most basic tenets of federal Indian law is the well-established rule that Indian affairs are governed by federal, not state, law. This general principle derives from the Constitution, which provides at Article I, Section 8, Cl. 3 that "The Congress shall have power . . . to regulate commerce. . . with the Indian tribes."

This principle has been recognized by the Supreme Court on many occasions. In *Oneida Indian Nation v. County of*

Oneida, 414 U.S. 661, 671 (1974), the Court relied upon the doctrine, first expressed by Chief Justice Marshall, that relations with the Indian tribes "according to the settled principles of our constitution, are committed exclusively to the government of the Union" (quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832)). Several years later, when that case came back before the Court, it reiterated: "With the adoption of the Constitution, Indian relations became the exclusive province of federal law." *County of Oneida v. Oneida Indian Tribe*, 470 U.S. 226, 234 (1985). In a similar vein, the Court has also noted that "tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States." *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134, 154 (1980). More generally, the Court has also recognized that "Congress has . . . acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation." *Williams v. Lee*, 358 U.S. 217, 220 (1959).

The primacy of federal law, and the inapplicability of state law, is even more pronounced with respect to taxation of Indian tribes. Once again, this Court has repeatedly recognized that fact. In *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), the Court discussed what it characterized as "the special area" of state taxation of Indians and stated that

> absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or income from activities carried on within the boundaries of the Reservation.

Id. at 148. In *Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985) the Court again recognized that the right to tax Indian tribes is derived solely from federal law:

> The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes. [Citations omitted]. As a corollary of this authority . . . Indian tribes and individuals generally are exempt

from state taxation within their own territory.

Id. at 764. The Court in *Blackfeet Tribe* also quoted from several older Indian tax cases, including *The Kansas Indians*, 5 Wall 737, 18 L.Ed. 667 (1867) (Indian tribe is "separated from the jurisdiction of [the State] and to be governed exclusively by the government of the Union"), and then noted that "this Court has never wavered from the views expressed in these cases." 471 U.S. at 464-65. Finally, in *National Farmers Union v. Crow Tribe*, 471 U.S. 845, 852, (1985), the Court further noted that in "all" cases involving tribal exemption from state taxation, "the governing rule of decision has been provided by federal law."

Perhaps the clearest statement by this Court that the taxation of Indian tribes has been completely preempted by federal law can be found in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). In that case, the Court held that certain tribal gambling activities were not subject to state jurisdiction. In reaching this conclusion, the Court declined to establish a broad, inflexible rule that would preclude state jurisdiction over tribes and tribal members under any circumstances, in the absence of congressional authorization. 480 U.S. at 214-15. However, the Court qualified that refusal by expressly noting that in "the *special area* of state taxation of Indian tribes and tribal members, *we have adopted a per se rule*." Id. at 215, n.17 (emphasis added). Because of its critical importance to the issue raised in this petition, footnote 17 from the *Cabazon* decision is set forth here in its entirety:

> In the special area of state taxation of Indian tribes and tribal members, we have adopted a per se rule. In *Montana v. Blackfeet Tribe* 471 U.S. 759 (1985), we held that Montana could not tax the Tribe's royalty interests in oil and gas leases issued to non-Indian lessees under the Indian Mineral Leasing Act of 1938. We stated: "In keeping with its plenary authority over Indian affairs, Congress can authorize the imposition of state taxes on Indian tribes and individual Indians. It has not done so often, and the

> Court consistently has held that it will find the Indians' exemption from state taxes lifted only when Congress has made its intention to do so unmistakably clear." *Id.*, at 765. We have repeatedly addressed the issue of state taxation of tribes and tribal members and the state, federal, and tribal interests which it implicates. We have recognized that the federal tradition of Indian immunity from state taxation is very strong and that the state interest in taxation is correspondingly weak. Accordingly, it is unnecessary to rebalance these interests in every case. In *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973), we distinguished state taxation from other assertions of state jurisdiction. We acknowledged that we had made repeated statements "to the effect that, even on reservations state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law . . . . Even so, *in the special area of state taxation*, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and *McClanahan v. Arizona State Tax Comm'n*, [411 U.S. 164 (1973)], lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent." *Ibid.* (emphasis added).

Cabazon, 480 U.S. at 215, n.17.

As this analysis makes clear, then, this Court has repeatedly held that the "special area" of state taxation of Indian tribes has been completely preempted by federal law, and that there is a *per se* rule under which states have no authority to tax tribes in the absence of express congressional

authorization.[6]

The teaching of these cases is that from the adoption of the Constitution, states have had no inherent power to tax Indian tribes on their reservations. As a result, the State of Oklahoma has no lawful right to tax the Wyandotte Tribe for on-reservation activities unless that authority has been conferred by federal law. In this case, therefore, as in *Oneida*, the rights asserted by the Tax Commission "do not depend on . . . any . . . statutes of the State, but upon "federal law only.

In light of these well-established principles, the holding of the Tenth Circuit Court of Appeals in this case is plainly wrong, and warrants review by this Court. In its decision, the appellate court held that the Oklahoma Tax Commission's right to tax the Wyandotte Tribe "arises under state law." Appendix A at A-4. In fact, under federal law as discussed in *Cabazon*, the Tax Commission has no right whatsoever under state law to assert a state tax against an Indian tribe. To the extent that the state asserts any right to tax the Tribe, that right must be derived from federal law.

In attempting to justify its erroneous holding, the Tenth Circuit then merely ignored footnote 17 in *Cabazon*. As support for its conclusion that Indian taxation has not been completely preempted by federal law, the Court of Appeals

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[6] The effect of this *per se* rule against state taxation is significant. In areas other than taxation, where there is no automatic preclusion, the Court must balance the respective federal, state and tribal interests involved in each case to determine whether a particular assertion of state jurisdiction is preempted under federal law. *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-45 (1980). With respect to state efforts to tax an Indian tribe, however, the Court in *Cabazon* expressly found such efforts to be *per se* preempted as a matter of federal law, and therefore "it is unnecessary to rebalance these interests in every case."

stated:

> The Supreme Court has recognized that its cases "have not established an inflexible *per se* rule precluding state jurisdiction over tribes and tribal members in the absence of congressional consent." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 214-15 (1987) (footnote omitted).

Appendix A at A-4. Yet, it is precisely the footnote omitted by the Tenth Circuit, and quoted above, that sets forth the very *per se* rule in the "special area" of state taxation that the Court of Appeals failed to apply. As a result, the ruling of the appellate court is clearly erroneous.

Finally, the basic question raised here--whether issues involving the taxation of Indian tribes should be litigated in federal or state courts--has not been rendered moot by the Court's recent decision in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. _____, 112 L.Ed. 2d 1112 (1991). In that case, the Court held that tribal sovereign immunity barred the Tax Commission from suing the tribe directly in order to collect state taxes from on-reservation activities. However, the Court also made clear that a number of issues concerning the extent of possible judicial remedies available to the state were yet to be determined. For example, the Court suggested that suits against individual tribal agents or officers might be permissible. *Id.* at 1123. Since the *Potawatomi* decision was rendered, the Tax Commission has already advanced this theory in two pending Indian tax cases in Oklahoma state courts. If other states follow suit, this raises the possibility of conflicting state and Federal court decisions as to the proper scope of tribal sovereign immunity from state tax suits. That result would clearly undermine the traditional notion of a single body of federal Indian law governing Indian affairs

throughout the United States.[7]

The purpose behind the complete preemption doctrine is to promote federal adjudication of uniquely federal issues. The taxation of Indian tribes is just such an issue. The decision of the Court of Appeals in this case will generate inconsistent state court rulings in an area that has traditionally been governed by federal law. To avoid this result, the Court should grant review in this case.

III. THE COURT OF APPEALS IGNORED THREE SUBSTANTIAL ISSUES OF FEDERAL LAW NECESSARY TO RESOLVE THE TAX COMMISSION'S CAUSE OF ACTION.

Finally, in addition to ignoring footnote 17 in *Cabazon*, the Court of Appeals also ignored the express holding of the District Court in its analysis of *Franchise Tax Board*. As discussed above, that case held that "a case may still arise under the laws of the United States if a right to relief under state law requires resolution of a substantial question of federal law in

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[7] This possibility is very real. The Oklahoma Supreme Court has held that the extent of tribal sovereign immunity from suit available to Oklahoma tribes in state court is determined by balancing the respective federal, state and tribal interests involved in each case. *State ex rel. May v. Seneca-Cayuga Tribe of Oklahoma*, 711 P.2d 77, 83-84, 89-92 (Okla. 1985) (tribal sovereign immunity does not bar suit by state seeking to prohibit tribal bingo games). The Tenth Circuit Court of Appeals, in enjoining further state court proceedings in that case, found that Oklahoma's method of analysis "has never been applied by a federal court to sovereign immunity questions." *Seneca-Cayuga Tribe v. State ex rel. Thompson*, 874 F.2d 707, 715, n.7 (10th Cir. 1989). Thus, the scope of tribal sovereign immunity in Oklahoma could vary dramatically depending on whether the issue was being litigated in federal or state court.

dispute between the parties." 463 U.S. at 13.[8] In discussing this aspect of federal jurisdiction, the Court of Appeals stated:

> The Tribe does not, however, indicate any other issue of federal law that must be resolved to decide the dispute between the parties other than the issue of sovereign immunity. We believe that the Court's decision in *Graham* forecloses any argument that the sovereign immunity of the Tribe is a sufficient question of federal law to allow removal of the case to federal court.

Appendix A at A-5. Indeed, *Graham* does foreclose such an argument. However, neither the Wyandotte Tribe nor the District Court even relied upon the existence of tribal sovereign immunity as the basis for removal in this case. Appendix D at D-2. To the contrary, the District Judge himself expressly stated the three specific issues of federal law that he believed required resolution in order to decide the Tax Commission's suit seeking to tax the Tribe, and which supported removal jurisdiction. *Id.* at D-3, n.3. Those three issues--the scope of the Indian Commerce Clause; the effect of a 1795 treaty between the United States and the Wyandotte Tribe; and the tax exemption provided Indian tribes under the Buck Act, 4 U.S.C. §104 *et seq.*--are separate and distinct from any argument based upon the Wyandotte Tribe's federal common law immunity from unconsented suit. The Tenth Circuit's failure to recognize this fact also warrants review by this Court.

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[8] The Court affirmed the continued vitality of this principle of federal question jurisdiction in *Merrell Dow Pharmaceuticals v. Thompson*, 478 U.S. 804, 808-09 and n.5 (1986).

CONCLUSION

The Supreme Court has repeatedly recognized that current federal Indian policy supports the twin goals of tribal self-government and strengthened reservation economies. *See, e.g. Cabazon*, 480 U.S. at 216-17 and ns. 19 and 20; *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 and n.17 (1983). The Court has also recognized on many occasions that tribal sovereignty and self-government are seriously threatened when subjected to state jurisdiction. *Cabazon*, 480 U.S. at 208 ("a grant to States of general civil regulatory power over Indian reservations would result in the destruction of tribal institutions and values"); *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877, 891 (1986) (state court jurisdiction over Indian tribe "invites a potentially severe impairment of the authority of the tribal government, its courts and its laws"); *Bryan v. Itasca County*, 426 U.S. 373, 388 (1976) (subjecting tribes to state taxing authority would "result in the undermining or destruction of . . . tribal governments").

If the most fundamental rights of American Indian tribes are to be subjected to state court adjudication, that decision should be reached only after the most rigorous legal analysis possible. That analysis has not yet been done with respect to the issues presented here. The Court in *Graham* did not consider the complete preemption doctrine as it applies to state taxation of Indian tribes. The Tenth Circuit considered it, but ignored the most important analytical principles. This case

presents the opportunity for the Court to fully address this far-reaching Indian law issue. Accordingly, this petition for a writ of certiorari should be granted.

Dated this 10th day of May, 1991.

Respectfully submitted,

GLENN M. FELDMAN
O'Connor, Cavanagh, Anderson
Westover, Killingsworth & Beshears
One East Camelback Road., #1100
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Attorneys for Petitioner

APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION,	)	No. 90-5100
Plaintiff-Appellant,	)	
v.	)	
WYANDOTTE TRIBE OF OKLAHOMA, a Federally Chartered Corporation,	)	
Defendant-Appellee.		

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA
(D.C. No. 87-C-9-E)

Submitted on the briefs:

Joe Mark Elkouri, General Counsel, and David Allen Miley, Assistant General Counsel, Oklahoma Tax Commission, Oklahoma City, Oklahoma, for Plaintiff-Appellant.

Glenn M. Feldman of O'Connor, Cavanagh, Anderson, Westover, Killingsworth & Beshears, Phoenix, Arizona, for Defendant-Appellee.

Before McKAY, MOORE, and BRORBY, Circuit Judges.

McKAY, Circuit Judge.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

The Oklahoma Tax Commission appeals here the district court's denial of the Commission's motion to remand this action to collect state taxes against the Wyandotte Tribe of Oklahoma to state court for lack of federal jurisdiction. In the alternative, it appeals the district court's dismissal of the case based on the court's finding that the Tribe is immune from suit. Because we find that the district court did not have jurisdiction over the suit, we need not reach the immunity issue.

I.

The Commission originally filed suit in the District Court of Ottawa County to enjoin the Tribe from operating a convenience store until it had collected and paid all applicable state taxes. The Tribe then filed suit in the United States District Court for the Northern District of Oklahoma to enjoin the Commission from enforcing state tax laws against the store. The store is owned by the Tribe and located on tribal property. The action in state court was removed to federal court, and the cases were consolidated for trial.

At the district court, the Tribe filed a motion to dismiss the action it had filed in federal court, so that the only remaining case would be the action the Commission originally filed in state court. The Commission did not oppose the Tribe's

motion. The Commission instead moved to remand the state action back to state court. The district court denied both motions and reached the merits of the case. On appeal, this court held that the Tribe's action in federal court should be dismissed pursuant to its own motion. The Commission's action was then remanded to the district court for a determination of whether the Tribe is immune from suit under the doctrine of sovereign immunity.

On remand, the Commission once again moved the district court to remand the case back to state court. The Tribe submitted a motion to dismiss based on sovereign immunity. The district court denied the Commission's motion to remand and dismissed the case based on the Tribe's defense of sovereign immunity. The Commission then brought this appeal.

II.

Unless expressly authorized by Act of Congress, an action brought in state court may not be removed to federal court unless the action may have been brought there originally. *See* 28 U.S.C. § 1441 (1988); *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987). Under the "well-pleaded complaint" rule, federal jurisdiction exists only when the plaintiff's well-pleaded complaint raises issues of federal law. *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 9-12 (1983). Appellees claim federal jurisdiction here under 28 U.S.C. § 1331 (1988). We review questions of law *de novo*. *Morgan v. City of Rollins*, 792 F.2d 975, 978 (10th Cir. 1986).

Citing the Supreme Court's recent decision in *Oklahoma Tax Comm'n v. Graham*, 489 U.S. 838 (1989), the Commission argues that the action was improperly removed to federal court because there is no federal question that appears on the face of its complaint. In *Graham*, the Court held that a defense of tribal immunity "to the claims asserted does not convert a suit otherwise arising under state law into one which, in the

statutory sense, arises under federal law." *Graham*, 489 U.S. at _____. The Court therefore concluded that the state law tax claims against the tribe did not present a federal question. Though acknowledging *Graham*, the Tribe's response is two-fold. Initially, the Tribe argues that federal law has so completely preempted this area of the law that appellant's complaint is federal in character, thereby vesting federal courts with jurisdiction over the Commission's complaint. Second, the Tribe contends that the suit requires the resolution of a substantial question of federal law to establish a right to relief under state law. We address, in turn, each of the Tribe's arguments.

A.

A well-established exception to the well-pleaded complaint rule is the complete preemption doctrine. It is premised on the proposition that "Congress may so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal in character." *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63-64 (1987). The Tribe claims that Indian taxation is such a creature of federal law. Citing *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974), the Tribe argues that relations with Indian tribes, "'according to the principles of our constitution, are committed exclusively to the government of the union.'" *Id.* at 671 (quoting *Worcester v. Georgia*, 6 Pet. 515, 561 (1832)).

The dispute in *Oneida*, however, centered around title to certain property. In determining that the suit could be removed to federal court, the Court stated: "Nor in sustaining the jurisdiction of the District Court do we disturb the well-pleaded complaint rule . . . . Here, the right to possession itself is claimed to arise under federal law in the first instance." *Id.* at 676. The Commission's claim of right to tax the Tribe here, however, arises under state law. The Supreme Court has recognized that its cases "have not established an inflexible *per*

se rule precluding state jurisdiction over tribes and tribal members in the absence of congressional consent." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 214-15 (1987) (footnote omitted). We are therefore faced with a situation "where the underlying right or obligation arises under state law and federal law is merely alleged as a barrier to its effectuation." *Oneida*, 414 U.S. at 675. Under *Graham*, this barrier does not convert this to a case arising under federal law.

B.

We turn next to the Tribe's claim that the Commission's complaint runs afoul of what it terms the artful pleading exception to the well-pleaded complaint rule. The Supreme Court, in *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 13 (1983), stated that "a case may still arise under the laws of the United States if a right to relief under state law requires resolution of a substantial question of federal law in dispute between the parties." The Tribe argues that the question of whether the Commission may properly plead a cause of action to tax the Tribe requires analysis of a substantial question of federal law.

The Tribe does not, however, indicate any other issue of federal law that must be resolved to decide the dispute between the parties other than the issue of sovereign immunity. We believe that the Court's decision in *Graham* forecloses any argument that the sovereign immunity of the Tribe is a sufficient question of federal law to allow removal of the case to federal court. We therefore are bound by the *Graham* decision.

III.

The decision of the district court denying the Commission's motion to remand the case back to the district court is therefore REVERSED. The issue of whether the Tribe is

immune from suit should not have been addressed and, accordingly, we VACATE the judgment of the district court dismissing the action. We remand the cause to the district court with directions to remand the action to the District Court of Ottowa County for further proceedings.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION,	)	No. 90-5100
Plaintiff-Appellant,	)	
v.	)	
WYANDOTTE TRIBE OF OKLAHOMA, a Federally Chartered Corporation,	)	
Defendant-Appellee.	)	

ORDER
Filed March 11, 1991

Before HOLLOWAY, Chief Judge, McKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, and EBEL, Circuit Judges

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This matter comes on for consideration of appellee's untimely petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition shall be considered timely filed on December 21, 1990, and is denied by the panel that rendered the decision sought to be reheard.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

/S/
ROBERT L. HOECKER, Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION,	)	NO. 90-5100
Plaintiff-Appellant,	)	
vs.	)	
WYANDOTTE TRIBE OF OKLAHOMA,	)	
Defendant-Appellee.	)	

AFFIDAVIT OF GLENN M. FELDMAN

STATE OF ARIZONA)
) ss.
County of Maricopa)

Glenn M. Feldman, being duly sworn upon his oath, states as follows:

1. I am the attorney of record for the Wyandotte Tribe of Oklahoma, the defendant-appellee in this matter.

2. I am admitted to practice law in the State of Arizona and the District of Columbia. I am a member of the bar of the Tenth Circuit Court of Appeals and, therefore, I am an officer of this Court.

3. I make this affidavit in order to explain why the Wyandotte Tribe's Petition for Rehearing and Suggestion for En

Banc Consideration has been filed more than 14 days after the entry of judgment in this matter.

4. I never received a copy of the judgment in this case from the Clerk's office, although the judgment was apparently filed with the Clerk on November 26, 1990.

5. The first indication I had that this case had been decided occurred on Monday, December 17, 1990. On that date, I received in the mail, from David Miley, the attorney for the Oklahoma Tax Commission, a Bill of Costs that Mr. Miley had filed in the District Court seeking costs with respect to this appeal. A copy of that Bill of Costs is attached hereto.

6. This Bill of Costs plainly indicated that Mr. Miley believed that he had prevailed on this appeal, although I had never received any opinion or judgment from the Court.

7. I immediately called the Office of the Clerk and explained the situation. After some checking, I was then advised that a judgment had been entered on November 26, 1990. I told the Clerk's assistant with whom I was speaking that I had never received a copy. She confirmed my mailing address, which was correct. (In fact, I had received a letter from the Court in mid-November advising me that this matter would be decided without oral argument). I asked her if she could fax a copy of the judgment to me. She said that she could not, but that she would mail another copy to me.

8. I then immediately called Mr. Miley. He advised me that a decision had been rendered, dated November 26, 1990, and that he had a copy. After briefly discussing the Courts' holding, I asked him to fax a copy to me. He did so, and I received a copy of the judgment, for the first time, at approximately 2:30 p.m. on Monday, December 17, 1990.

9. Prior to that time, I was not aware of the existence of the Court's judgment in this case, nor had I received or seen a copy.

10. Based upon these facts, I would respectfully request that the Court consider the Wyandotte Tribe's Petition for Rehearing and Suggestion for En Banc Consideration, even though it is being filed more than 14 days after the Court's judgment was entered.

Dated this 20th day of December, 1990.

/S/
Glenn M. Feldman
O'CONNOR, CAVANAGH, ANDERSON, WESTOVER, KILLINGSWORTH & BESHEARS
One East Camelback, #1100
Phoenix, Arizona 85012-1656

Attorneys for Wyandotte Tribe of Oklahoma

SUBSCRIBED AND SWORN TO before me this 20th day of December, 1990.

/S/
Notary Public

My Commission Expires:

April 9, 1993

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel, OKLAHOMA TAX COMMISSION,	)	No. 87 C- 9-E
	)	87-C-63-E
Plaintiff,	)	Consolidated
v.	)	
WYANDOTTE TRIBE OF OKLAHOMA,	)	

Defendant.

ORDER

This matter is before the court on the mandate of the United States Court of Appeals for the Tenth circuit remanding to this court the issue of sovereign immunity.[1] The Tribe moves to dismiss the State's lawsuit on the grounds of sovereign immunity. The State moves to remand the case on the authority of *Oklahoma Tax Commission v. Graham*, _____ U.S. _____, 109 S.Ct. 1519 (1989).

The State asks the court to revisit the issue of removal in this case. This court previously denied the State's motion to

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[1] Order and Judgment of April 5, 1989. The Tenth Circuit reversed this court's order denying the motion of the Wyandotte Tribe of Oklahoma (Tribe) to voluntarily dismiss its suit for declaratory and injunctive relief. This reversal dismisses the Tribe's lawsuit and consequently the issue of sovereign immunity must be addressed.

remand.[4] The State presented the same argument it now urges, that its action against the Tribe has been removed on the basis of a tribal immunity defense which presents a federal question only when Congress expressly provides and, Congress has not expressly provided for federal court adjudication of tribal immunities.

The Tribe has maintained consistently throughout this lawsuit that although the above is true, the sovereign immunity defense is not the basis for removal in this case. The Tribe asserts that this court has original jurisdiction because the right to relief under state law--to tax Indian sales of cigarettes on Indian land--requires resolution of a substantial question of federal law in dispute between the parties. The Tribe argues that a federal court has original jurisdiction to determine whether Congress has provided for state taxation of Indians in these circumstances. The Tribe relies primarily upon *Franchise Tax Board v. Laborers Vacation Trust*, 463 U.S. 1, 103 S.Ct. 2841 (1983) for the proposition that a case may still arise under the laws of the United States if a right to relief under state law requires resolution of a substantial question of federal law in dispute between the parties. The Tribe relied on the authority of *Franchise Tax Board* in its previous opposition to remand. 463 U.S. at ____, 103 S.Ct. at 2848. This court also relied on that authority:

> As the Court stated in *Franchise Tax Board* with regard to the principles for determining when a federal question is presented in a removal action, 'simply to state these principles is not to apply them to the case at hand.' Although the State's petition would at first blush appear to rely

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[4] Order of March 31, 1987 in Case No. 87-C-63-E, consolidated with this case pursuant to the Order of the same date.

> purely on state law, ultimately the State must prove that it has the power to tax the Wyandottes in order to be able to recover on its claims. Although the Wyandottes certainly argue federal law in defense, the right to relief of the State under state law requires resolution of a substantial question of federal law in dispute between the parties because the State must, as an element of its claim, prove that it has the power to apply its laws to the Wyandottes. Therefore the court concludes that a federal question is presented by the State's petition, and the motion to remand should be denied.

(Order of March 31, 1987, at p. 3)[1]

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[1] Although the court did not specifically so state, it believed that the federal questions implicated by the case included at least the following: (1) the Constitution, Article I, §8 which gives the federal government, not the states, the power to regulate commerce with the Indian tribes *see, Washington v. Confederated Tribes*, 447 U.S. 134, 100 S.Ct. 2069 (1980) (the power to tax affects the regulation of commerce with the tribes); (2) treaty rights, including the Treaty with the Wyandotte, et. al., of 1795, specifically Article VIII which states that Indians may not be imposed on their trade; and (3) section 109 of the Buck Act, 4 U.S.C. §104 et. seq., which exempts Indians from state sales or use taxes, *see, Warren Trading Post Co. v. Arizona State Tax Comm'n*, 85 S.Ct. 1242, 1245-1246, 380 U.S. 685, 690-691 (1965) (The Buck Act, in which Congress permits states to levy sales or use taxes within certain federal areas, does not apply to Indian reservations.")

Oklahoma Tax Commission v. Graham appears to overrule this court's earlier reasoning that the taxation issue presents a basis for removal. The Court did not refer to *Franchise Tax Board* but, did state:

> In *Caterpillar, [Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987)] we ruled that application of the well-pleaded complaint rule defeated federal question jurisdiction, and therefore removability, in a case in which employees sued on personal state law employment contracts. We refused to characterize these state law claims as arising under federal law even though an interpretation of the collective bargaining agreement might ultimately provide the employer a complete defense to the individual claims, and even though employee claims on the collective bargaining agreement would have been the subject of original federal jurisdiction. *Caterpillar, supra*, at 396-398. The state law tax claims in the present case must be analyzed in the same manner. Tribal immunity may provide a federal defense to Oklahoma's claims. *See Puyallup Tribe, Inc. v. Washington Game Dept.*, 433 U.S. 165 (1977). But it has long been settled that the existence of a federal immunity to the claims asserted does not convert a suit otherwise arising under state law into one which, in the statutory sense, arises under federal law. *Gully v. First National Bank*, 299 U.S. 109 (1936). The possible existence of a tribal immunity defense,

> then, did not convert Oklahoma tax claims into federal questions, and there was no independent basis for original federal jurisdiction to support removal.

_____ U.S. at _____, 109 S.Ct. at 1521. Therein lies the basis upon which the State reurges its motion to remand.

Despite the authority of *Graham*, this court must address the case in its current procedural context. *Graham* was decided before the Tenth Circuit issued its mandate directing this court to address the sovereign immunity issue and, this court must assume that it is to comply with these directions despite *Graham*. Further, if sovereign immunity operates as a complete defense to the State's action, then neither this court nor the state court has jurisdiction to hear this suit and remand would be futile. Neither a federal nor a state court has jurisdiction over a suit against a tribe absent either "an effective waiver or consent" by the tribe, *Puyallup Tribe, Inc. v. Washington Game Department*, 433 U.S. 165, 172, 97 S.Ct. 2616, 2621 (1977), or an 'unequivocal expression of contrary legislative intent" to waive sovereign immunity. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59, 98 S. Ct. 1670, 1677 (1978). While tribal sovereign immunity is not absolute, waivers of sovereign immunity are strictly construed. *Seneca-Cayuga Tribe of Oklahoma v. State*, 874 F.2d 709, 715 (10th Cir. 1989). It is, therefore, appropriate to address the sovereign immunity issue.

The court previously has held that the convenience store over which the state seeks to impose cigarette excise taxes is Indian Country within the meaning of 18 U.S.C. §1151(a). Because the convenience store is located in Indian Country, the Tribe possesses sovereign powers with respect to the land and the store. *The Citizen Band Potawatomi Indian Tribe of Oklahoma v. The Oklahoma Tax Commission*, 888 F.2d 1303, 1306 (10th Cir. 1989). The State does not contend that the Tribe has in any way given its consent to suit against it, nor does it argue that Congress has abrogated the Tribe's sovereign

immunity.[4] Neither this court nor the state courts have jurisdiction to hear the State's suit in the face of the Tribe's sovereign immunity. This case must, therefore, be dismissed.

IT IS THEREFORE ORDERED that this action is dismissed.

ORDERED this 9th day of April, 1990.

/S/
JAMES O. ELLISON
UNITED STATES DISTRICT
JUDGE

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[4] In *The Citizen Band Potawatomi*, the Tenth Circuit also noted that Oklahoma has no authority to tax the transactions of a convenience store located in Indian Country unless Oklahoma has received an independent jurisdictional grant of authority from Congress, citing to *Bryan v. Itasca County*, 426 U.S. 373, 376-377, 98 S.Ct. 2101, 2105-2106 (1976); *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 475-476, 96 S.Ct. 1634, 1645-1646 (1976); *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 175-177, 93 S.Ct. 1257, 1265-1267 (1973); *United States v. Barquin*, 799 F.2d 619, 621 (10th Cir. 1986), 888 F.2d 1306-1307.

APPENDIX E

Title 28, United States Code, §§ 1441(a)(b) and (c).

§1441. Actions removable generally.

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) The court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

(As amended Oct. 21, 1976, Pub.L. 94-583, § 6, 90 Stat. 2898; June 19, 1986, Pub.L. 99-336, § 3(a), 100 Stat. 637; Nov. 19, 1988, Pub.L. 100-702, Title X, § 1016(a), 102 Stat. 4669; Dec. 1, 1990, Pub.L. 101-650, Title III, § 312, 104 Stat. 511